

**BEFORE THE  
COMMISSION ON COMMON OWNERSHIP COMMUNITIES  
FOR MONTGOMERY COUNTY, MARYLAND**

**In the Matter of:**

Greencastle Lakes Community Association  
c/o Jennifer Jackman, Esq.  
Whiteford, Taylor, Preston  
1025 Connecticut Ave., N.W  
Washington, D.C. 20036  
**Complainant,**

v.

Hermann and Janice Muller  
3643 Childress Terrace  
Burtonsville, MD 20866  
**Respondent**

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Case No. 829-G  
Corrected Decision:  
December 27, 2007

**DECISION AND ORDER**

The above-captioned case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, for public hearing on September 26, 2007, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12 and 10B-13 of the Montgomery County Code, 1994, as amended, and the duly appointed hearing panel, having considered the testimony and evidence of record, finds, determines and orders as follows:

**The Dispute**

The Respondents, Hermann and Janice Muller, are owners of a townhouse within the Greencastle Lakes development, which is governed by the Greencastle Lakes Community Association (hereinafter the "Association" or "Complainant"). The Association utilizes the services of a managing agent, The Management Group Associates, Inc., to oversee its properties. On April 3, 2004, the Association, through its managing agent, sent the Respondents notice of a violation of the Association's Architectural and Environmental Review Committee's Standards and Guidelines (the "Architectural Guidelines") that was in need of correction. Complainant's Exhibit 3.

Specifically, the Mullers had replaced a wooden fence located at the rear of their property. The Mullers were advised that they had not submitted an architectural change request form to the Association prior to making the change. Respondents were further

advised that the style of the replacement fence was different from the prior fence it had replaced and that there was not a capboard on top of the fence. *Id.* The Association followed up the April 3<sup>rd</sup> notice with similar notices dated July 8, 2004 (Complainant's Exhibit 4) and August 31, 2004 (Complainant's Exhibit 5).). On May 18, 2005, the Association sent Respondents an enforcement notice. Complainant's Exhibit 6.

### **Procedural History**

On September 27, 2005, the Association filed a complaint with the Commission on Common Ownership Communities, and the Commission's staff sent a copy of the complaint to the Mullers on October 5, 2005. Commission Exhibit 1 at 1-5, 142. In response to a promise by Mr. Muller to make the necessary changes to the fence, the Complainant informed the Commission that it would allow the Mullers until March 1, 2006 to make the changes. (Commission Exhibit 1 at 146.) Informed by the Complainant that the Mullers had taken no action by that deadline, on May 1, 2006, the Commission staff instructed the Mullers either to request mediation of the dispute or to submit the necessary architectural change application to the Complainant, or it would submit the dispute to the Commission for determination (Commission Exhibit 1 at 148). Notice that the dispute was being submitted to the Commission for a decision on whether to accept jurisdiction and to calendar it for a public hearing, dated June 16, 2006, was sent to Hermann and Janice Muller. Commission Exhibit 1 at 152. Jurisdiction of the dispute was accepted by the Commission on July 5, 2006, with a hearing date set for August 17, 2006. Commission Exhibit 1 at 153. A summons was sent to each of the parties. Commission Exhibit 1 at 155-160.

On June 26, 2006, prior to the meeting at which the Commission accepted jurisdiction of the dispute, the Association received an Application for Change signed by Mr. Muller. Commission Exhibit 1, p. 150. On June 28, 2006, the Association sent a response to Mr. Muller. In its response, the Association noted that it was unable to review his architectural change request form due to technical failures in the application. Specifically, the Association noted that the application did not include an official survey plat with the location of the fence marked in order to ensure it was within his property lines, lacked information on materials used for the fence and whether it included post caps and a cap board, and the application lacked the required signatures from both of his neighbors. Commission Exhibit 1 at 149.

Despite these deficiencies, both parties requested a continuance of the hearing set for August 17, 2006 for the purpose of settling the case. The parties were subsequently unable to resolve their dispute and on June 27, 2007, the staff sent the parties a notice that the public hearing of the dispute was rescheduled for July 18, 2007. The hearing date was again rescheduled at the request of Mr. Muller who represented that he was in Florida and had not received notice of the hearing in sufficient time to resolve work conflicts.

On July 10, 2007, the hearing panel issued a Notice of Continuance requiring the Mullers to select a hearing date in September, 2007. Mr. Muller selected September 19

or 26, 2007, and on August 2, 2007, the hearing panel issued an order setting the dispute for a public hearing on September 26, 2007.

The case was heard by a hearing panel on September 26, 2007. The Greencastle Lakes Community Association was represented by counsel, Ms. Jennifer Jackman, Esq. Also present was Ms. Jessica Bateman, management agent of the community, and Mr. Richard Jones, Treasurer of the Association's Board of Directors, both of whom testified on the Association's behalf. Through these witnesses the Association moved into the record supplementary documentation and photo exhibits. Neither Respondent appeared for the hearing, nor did they send legal counsel to represent them.

## **Discussion**

Representatives of the Association testified that prior to the hearing the Association received two more applications from Hermann Muller. The first, dated August 31, 2007, was again not approved by the Association due to technical failures. These failures were substantially the same as those which led to the rejection of the June 26<sup>th</sup> application. Complainant's Exhibit 8.

Shortly prior to the hearing, the Association received another Application for Change from Hermann Muller. Complainant's Exhibit 11. According to the testimony of Mr. Jones, the Association's treasurer, this application was technically complete. Mr. Jones also expressed the opinion, however, that this application would also be rejected by the Association since it did not address the prior problems the Association had with the replacement fence.

According to testimony and supporting documentation before the panel, fences in the Greencastle Lakes Community are of the "Wyngate" or board-on-board style. According to a picture submitted into evidence by the Association, the Wyngate style of fence consists of vertical fence boards on a post-and-rail frame, with a capboard across the top. (Complainant's Exhibit 10) The fence erected by Mr. and Mrs. Muller varied from this design by being tapered at the top of the fence and by not including a capboard. The witnesses further testified that the gate to the fence is also not in compliance with the Architectural Guidelines, it being of a stockade style.

The installation and upkeep of townhome privacy fencing in the Greencastle Lakes Community is governed by Article III, Section 35 of the Architectural Guidelines. The current version of the guidelines specifically provides that "[a]ll townhouses in the community were built with Wyngate-style (also known as alternative board and board-on-board) privacy fencing." Commission Exhibit 1 at 25-26. Each vertical support post for the fence must also be capped with "metal/vinyl" protectors. *Id.* The guidelines allow for a different style of fencing in an attached row of houses only if all homeowners in that row consent to the change. Each neighboring homeowner must further agree that, if a homeowner decides to erect a fence, it must be in the same style, according to Article 35.1.3 of the Architectural Guidelines. Commission Exhibit 1 at 26.

The final Application for Change submitted to the Association included signatures by Tom Fuentes (3645 Childress Terrace) and Eunice Solano (3647 Childress Terrace). The caption located immediately above these signatures specifically notes that signatures “do not constitute approval or disapproval of the changes described in [the] application.” Commission Exhibit 11. Furthermore, there is no evidence in the record to establish that either signatory to Mr. Muller’s application owned a privacy fence or, if they did, would undertake to alter their fence to match the style of fencing which had been erected at 3643 Childress Terrace. Nor is there evidence in the record that Tom Fuentes and Eunice Solano would be the only neighbors affected by the change style of privacy fence at 3643 Childress Terrace; though neither did the Association present evidence that additional neighbors who would be affected.

The Association also submitted into evidence the community’s prior architectural guidelines. Those guidelines, which went into affect on September 1, 1987, also required privacy fencing for townhouses be in the Wyngate style. Complainant’s Exhibit 2 at 6. Mr. Jones testified that prior to those guidelines homeowners were required to maintain the style of fencing that existed when the community was built.

At the hearing, the Association made an oral motion to amend their complaint to request the awarding of legal fees. In making its request, the Association argued that it had incurred additional expenses through the failure of the Respondents to participate in the dispute resolution process, necessitating the retaining of legal counsel. The Association based its claim for legal fees on Article V, paragraph 5 of the Architectural Guidelines which provides that costs for legal actions incurred by the Association “during pursuit of its right to remove or correct violations shall be charged to the affected homeowner following resolution of the action.” Commission Exhibit 1 at 57. The Association further noted that legal fees may be granted pursuant to Section 10-B-13(d) of the Montgomery County Code.

The record was kept open two days to allow the Association to file documentation to support its request for attorney’s fees. Counsel for the Association subsequently filed an affidavit in which it was represented that the Association incurred attorneys’ fees and costs in the amount of \$2523. A copy was sent to the Mullers on September 26, 2007 and they were granted until October 10, 2007 to respond to the Motion for Attorney’s Fees.

Following receipt of the attorneys’ fee affidavit the Commission received an e-mail. The e-mail purported to be from Mr. Muller and was dated October 8, 2007. The text of the e-mail asserted that attorney fees should be paid by the “HOA” (homeowners association). The e-mail noted that any changes made to the property at 3643 Childress Terrace “had been made with a lot of consideration” and that the writer would do nothing to jeopardize the value of his property. The e-mail referred to the most recent Application for Change to argue that the neighboring property owners did not have a problem with the changes made to the property. The author of the e-mail conceded to mistakes in not filing the Application for Change in a timely manner. The author of the e-mail further notes that the Association chose to hire “the legal team at that cost” and

should be the ones to bear those costs. The e-mail concludes with the author stating that he cannot afford to bear the costs of the Association's legal fees.

The e-mail fails to provide justification for the Muller's failure to file an Application for Change prior to their under taking work to replace their fence. Nor does it explain why a valid application addressing the deficiencies in the fence was never filed with the Architectural Committee. Finally, the e-mail does not address why neither of the respondents attended the September 26, 2007, hearing, despite the fact that the hearing was continued at their request to allow them to attend.

## **FINDINGS OF FACT**

1. The property at 3643 Childress Terrace, Burtonsville, MD 20866 is a townhouse located within the Greencastle Lakes development. It is jointly owned by Hermann and Janice Muller.

2. All homeowners within the development are, by virtue of their home ownership, members of the Greencastle Lakes Community Association. As members of the association, all homeowners within the Greencastle Lakes Community are required to maintain their property pursuant to guidelines set forth in the Association's Declaration of Covenants, By-Laws and Articles of Incorporation and to rules set forth by an elected Board of Directions.

3. Sometime prior to April 3, 2004, the privacy fence located on the property at 3643 Childress Terrace was removed and replaced with a new privacy fence.

4. The installation, maintenance and replacement of privacy fences for townhouses in the Greencastle Lakes development are governed by Article III, Section 35 of the Architectural and Environmental Review Committee's Standards and Guidelines. These guidelines provide that all privacy fences shall be in the Wyngate (also known as board- on-board or alternative board) style, that they all include capboards on top of the fences and that each vertical support post be capped "metal/vinyl" protectors.

5.. Prior to installing the new privacy fence, the homeowners failed to file an application with the Association's Architectural Committee seeking permission to install a fence that varied from the required Wyngate style. Since installing the fence, the Respondents have filed three Applications for Change with the Committee; each of which was either technically incomplete, failed to comply with the Article III, Section 35 of the Architectural Guidelines, or both.

6.. At the time of the hearing, the Architectural Committee had not had an opportunity to formally act upon the most recent Application for Change submitted by Hermann Muller. Mr. Jones expressed the opinion that this most recent application would not be approved by the Committee since it did not provide for the fence being brought into compliance with the requirements of the Architectural Guidelines.

However, since, as Mr. Jones conceded, this application was technically complete, it must be formally acted upon before any action can be required of the Mullers.

7.. The Association contracted the services of legal counsel at the rate of \$290 per hour. The legal fees incurred by the Association total in the amount of \$2523.00.

8... Over the course of three years, Respondents have maintained a privacy fence that is not in compliance with the Architectural Guidelines. Up until June 26, 2006, Respondents failed to respond to any of the requests made by the Association that they file an application with the Association's Architectural Committee to address this situation. Respondents then caused a delay of over a year in the progress of this case by promising to make the necessary repairs to the fence, a promise which led the Association to request a continuance of the August, 2006 hearing date, and a promise which the Respondents did not keep. The applications subsequently filed by the Respondents were either technically incomplete, failed to address the fact that the replacement fence did not comply with Article III, Section 35 of the Guidelines or both, resulting in additional and needless delay for the Association. Due to this lack of action on the part of by the Respondents, the Association was required to incur significant legal expenses. By then requesting a continuance of the July, 2007, hearing in order that they might attend, and then failing to either appear at the hearing or send representation in their place, the Respondents caused the Association to incur additional expenses that might otherwise been avoided. In addition, by their actions the Respondents needlessly imposed upon the resources of the Commission, both by twice taking up limited time for public hearings available to the Commission and by occupying the time and effort of Commission staff in order to respond to the Respondents' request to re-schedule the hearing.

### **CONCLUSIONS OF LAW**

1. The privacy fence installed by the Respondents at 3643 Childress Terrace does not comply with Article III, Section 35 of the Association Guidelines. Specifically, each of the horizontal boards in the fence impermissibly tapers at the top and the fence lacks a capboard at the top. Furthermore, the fence has a stockade style gate which is different from the required Wyngate style.

2. Aside from the currently fence not meeting the required design standards, the Respondents are also in violation of the architectural rules for having constructed the fence without the prior approval of Architectural and Environmental Review Committee.

### **Request for Attorney Fees**

Attorney fees may be awarded against the losing party under Section 10B-13 (d) (3) of the Montgomery County Code if the panel finds that the party substantially delayed the dispute resolution process. The Panel agrees that the Respondent should be

compelled to bear some of the financial burden incurred in the pursuit of this action. The Respondent never answered the complaint, did not respond to the Commission's offer of mediation, did not appear at the hearing, and never offered any justification for their refusal to comply with the rules and the Complainant's attempts to enforce those rules. We find that the Respondents unreasonably contributed to the significant delay in resolving this dispute by seeking a continuance of the first hearing for the purposes of settlement and then making no good faith effort to bring their property into compliance. When the case was reset for a hearing in July, 2007, Respondents requested another continuance for business reasons but then failed to appear on the date they selected. We therefore find that attorney's fees are warranted under Section 10B-13(d) (3).

The Respondents assert that they should not be held liable for the attorney fees incurred by the Association, arguing that it was the Association's choice to contract the services of legal counsel at the rate billed. Though not part of the official record, we feel it appropriate to respond to these comments. The Association has a fiduciary duty to the homeowners of the Greencastle Lakes development to maintain the appearance of the community in compliance with the terms of their architectural guidelines. When Respondents failed to adequately respond to any of the four notices sent by their management company, the Association was compelled by the fiduciary duty to bring this action. In order to prepare for the original hearing in August, 2006, the Association was required under certain provisions of the Maryland Code to obtain legal representation. (This requirement has since been changed but the change was not effective until October 1, 2006.) Respondents, by their own lack of action, necessitated that the Association incur these legal expenses. And now, Respondents have failed to present any evidence by which we may find these expenses were either unnecessary or excessive.

The Panel may also award attorney's fees if they are required by the Association's rules and if they are reasonable under the circumstances, Montgomery County Code, Section 10B-13 (last paragraph). We find that the Association's rules allow it to assess attorney's fees when it successfully brings an action to compel compliance with its architectural rules. *See*, Article V, Section 4, of the "Standards and Guidelines of the Architectural and Environmental Review Committee" (May 1, 2004). *See also*, *Greencastle Lakes Community Association v. Abeje*, #776-G (June 26, 2006) (finding that the same architectural rule allowed the Commission to assess attorney's fees in a similar case). We further find the Complainants' request for attorney's fees to be reasonable given the failure of the Respondents to participate in the dispute resolution process in any meaningful way (other than to seek continuances of hearing dates), resulting in the Association being required to retain legal counsel for a hearing for which the Mullers failed to appear.

## **ORDER**

For the reasons set forth above, the Panel finds the Respondents to be in violation of their obligation to the other members of the Association to maintain their property in accordance to the provisions of the Architectural Guidelines. Accordingly, the Panel **ORDERS** the following:

1. Within 30 days from the date of this Order, , assuming that the Association's Architectural and Environmental Review Committee has acted upon the most recent Application of Change, the Respondents, Hermann and Janice Muller, must file with the Architectural Committee a technically complete Application for Change regarding the privacy fence located on their property. The Respondents must seek any assistance they may need from the Committee in completing the application to insure that it is complete and addresses the technical and aesthetic concerns of the committee.
2. If the Architectural Committee has not officially acted upon the Respondents' most recent application by the date of this Decision and Order, then Respondents must file a new Application for Change within two weeks after the Committee's action upon Respondents' application. If the Architectural Committee has already formally acted upon this application by the date of this Decision and Order, then Respondents must file a new Application for Change set for above within two weeks of the issuance of this Order.
3. Within 30 days after the Committee's decision on their application, the Respondents must complete any and all work required to bring the existing privacy fence into compliance with the Architectural Guidelines.
4. The Respondents must reimburse the Association in the amount of \$2523.00 for legal fees incurred in the pursuit of this action, and \$50.00 for its costs in filing this complaint, within 30 days of the date of this Decision and Order.

Panel Members Antoinette Negro and Steven Maloney concur in the foregoing.

Any party aggrieved by the hearing panel's decision may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within (30) days from the date of this Order, pursuant to the Maryland Rules of Procedures governing administrative Appeals.

BY: \_\_\_\_\_  
John Sample, Panel Chair

Date: December 6, 2007; corrected  
December 27, 2007